88-1680

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

RIKKI VENEMON, CAROLINE CRAWFORD, THOMAS KEATING, MICHAEL BARNES, THOMAS HUFF, ROBERT BAXTER, and THE CITY OF PORTLAND, OREGON,

Petitioners,

v.

HARRY LOUIS DAVISON,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where police in effecting an arrest for a traffic infraction did not need to use force but nonetheless threatened to put the citizens' "face in the concrete", grabbed him by the throat without warning from behind, twisted his arm behind him, threw him to the sidewalk, pushed his face to the sidewalk, pulled his hair, and kicked him in the side, must the citizen allege in addition to these acts that he suffered substantial injuries as a result of these attacks to state a claim for relief under 42 U.S.C. § 1983 ("§ 1983")?

2. Should the Court overrule the portion of Monroe v. Pape, 365 U.S. 167 (1961), which affirms the settled statutory interpretation of this Court defining "under color of" law as including actions constituting an abuse of authority, when the consequence of such a

decision would be to deny victims of such abuses of power a federal forum under § 1983?

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STATEMENT OF THE CASE

On the evening of September 3, 1984, Mr. Davison left a restaurant bar in downtown Portland, Oregon and walked to his parked car. As he reached for his car door, he saw petitioner Venemon stopped at the intersection in her patrol car. The two made eye contact. Mr. Davison got into his car and drove away, making two legal left hand turns. When Mr. Davison made a right turn he used a hand signal as state law requires because his car's right turn indicator was not functioning. Officer Venemon pulled him over to the curb on the stated grounds that "We don't use hand signals in this town after dark."

Officer Venemon demanded that Mr. Davison remove his driver's license from his wallet and show it to her. He did so. She next demanded that he step out of his car and move to the sidewalk. He did so. She further demanded that he

perform a series of sobriety tests, but he protested that he had only had a couple of drinks over a five-hour period and that this was really not necessary.

Mr. Davison was upset and frustrated with the situation and tried to reason with officer Venemon rather than performing the tests. She then announced that he was under arrest for driving while intoxicated. He protested that he was stone sober and that what she was doing was not right. She demanded that Mr. Davison put his hands behind his back because she was going to handcuff him. Mr. Davison reiterated that he had done nothing wrong, that we was stone sober, and replied that it was not necessary for officer Venemon to subject him to this sort of treatment.

"You'll do it my way or you'll find your face in the concrete", officer

Venemon said, moving to the patrol car to request the presence of more officers.

Mr. Davison never advanced toward Officer Venemon. He never made any physical gestures in the direction of officer Venemon. He made no move to flee toward his car or in any other direction. He did not realize any other officers had arrived on the scene; certainly none spoke to him. Suddenly, he felt an arm reach around his throat from behind him, and someone grabbing his arm and twisting it behind his back. The officer or officers threw him to the sidewalk, pulled his hair, and shoved his face into the concrete. Someone kicked him in the side. He was gasping for air. He first became aware that the perpetrators of this violence were other police officers when he felt his hands being twisted behind him and manacled. By the time he was lifted from his facedown position on the sidewalk

and pitched into the rear of officer Venemon's patrol car, he was sobbing.

At a local police precinct, Mr. Davison took two breathalyzer tests. Each registered a 0.00 blood alcohol level. He was nonetheless held at the police station for an hour. Before leaving, the officers cited him for resisting arrest (a charge for which he was never convicted) and failing to signal with lights (for which he was). Upon his release from the police station, Mr. Davison went directly to the emergency room of first one hospital then another, where he requested further blood alcohol testing and was administered valium for pain in his neck, wrists and in the back of his head.

Mr. Davison then sued petitioners in the United States District Court for the District of Oregon under § 1983 alleging that petitioners violated several

primarily Fourth Amendment rights made applicable to states through the due process clause of the Fourteenth Amendment to the United States Constitution, including the right to be free from excessive force.

The statements in pages 11-12 of the petition for certiorari as to jurisdiction and the trial and appeals court orders are otherwise correct.

SUMMARY OF ARGUMENT

The Court should not grant certiorari in this case to decide either question petitioners pose. Respondent's § 1983 claim relies upon the Fourth Amendment to the United States Constitution made applicable to state action through the due process of law clause of the Fourteenth Amendment and not, as petitioners assert, upon the due process clause alone. The relevant rule regarding Fourth Amendment cases is not in

doubt: if a seizure is unreasonable, it is unconstitutional. Reasonability is an issue of fact for jury determination based on carefully balancing the individual and governmental interests at stake under the facts and circumstances of each particular case. The concept of reasonableness is not amenable to a bright line interpretation as petitioners suggest and urge. The Ninth Circuit appropriately remanded the issue of the reasonability of the force used in respondent's arrest for a factual determination. The Court should thus deny petitioners' request for a writ of certiorari as to the first question they present.

Petitioners also urge the Court to overrule this Court's settled statutory interpretation of the phrase "under color of" law found in Monroe and its predecessors and progeny. Petitioners make this request on the basis of policy

considerations better addressed to Congress, which has knowingly chosen to acquiesce in this Court's interpretation of this phrase for 48 years. The arguments propounded for ignoring the doctrine of stare decisis in this case do not satisfy the test this Court recently set forth in Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) for determining when a court may properly depart from precedent. The Court should thus deny petitioners' request for a writ of certiorari to consider petitioner's second question as well.

REASONS FOR DENYING THE WRIT

A. Under the clear standard this Court has recently articulated, determining whether a Fourth Amendment excessive force claim will lie under § 1983 in this case turns on questions of fact appropriate for jury determination and not for decision by summary judgment.

Graham v. Connor, 57 U.S.L.W. 4513 (May 15, 1989), established the constitutional standard governing a free

citizen's claim that police officers used excessive force in arresting him. This Court held that such claims are properly analyzed under the Fourth Amendment's "objective reasonableness" standard rather than under a substantive due process standard, specifically rejecting the four-part test of Rutherford v. City of Berkeley, 780 F.2d 1444 (2d Cir. 1973), cited by petitioners as controlling:

> Today we * * * hold that all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process approach.
>
> * * *
>
> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the "'nature and quality of the intrusion on the individual's Fourth Amendment interests'"

> against the countervailing governmental interests at stake.
>
> * * *
>
> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. Its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.
>
> * * *
>
> As in other Fourth Amendment contexts, * * * , the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Id. at 4516 (citations omitted, emphasis in original).

This test of "unreasonableness" under all the facts and circumstances is clearly not amendable to imposition of the bright line rule -- petitioners urge -- that no force is excessive in an arrest situation unless it causes "severe" or "substantial" injuries. Applying the case-by-case analysis of Graham to the facts of this case, then, makes clear that the allegations in respondent's complaint state at least several issues of fact appropriate for jury determination.

The severity of the "crime" -- a misdemeanor traffic infraction -- for which respondent was arrested was minor. He was neither actively resisting arrest nor attempting to flee the scene. Unarmed and unthreatening, respondent posed no danger to the safety of the police officers, and no one else was present. Under the circumstances, no force was necessary -- or so a jury could certainly

find -- and such force as petitioners actually used was brutally excessive. Indeed, Oregon courts have held that where an officer encounters only passive resistance, his or her authority to use force to effect an arrest is diminished substantially. State v. Jordan, 38 Or. App. 421, 424, 591 P.2d 431 (1979); see also Stevens v. City of St. Helens, 231 Or. 1, 6, 371 P.2d 686 (1962). The Ninth Circuit appropriately reversed the District Court on this issue.

Petitioners cite an Oregon statute as authority for the principle that "the privilege to arrest carries with it the privilege to use such force as may reasonably be necessary to accomplish the arrest" (Pet. 15), but this merely restates the same general test of reasonableness as the foregoing, again presenting a factual matter for jury determination and not for reversal of the

Ninth Circuit's ruling. This Court should thus deny petitioner's request for a writ of certiorari to consider the first question they have presented.

B. Monroe correctly holds that misuse of power granted by state law constitutes action taken under color of state law, and petitioners have not shown the special justification necessary to overturn this ruling.

Monroe v. Pape, 365 U.S. 167 (1961) reaffirmed the holdings in U.S. v. Classic, 313 U.S. 299 (1941) and Screws v. U.S., 325 U.S. 91 (1945) that "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." Monroe, supra at 184.

Petitioners say "experience" has shown that this Court incorrectly interpreted the term "under color of" law in Monroe (and thus presumably in Classic and Screws as well), and urge that it now overrule that decision on policy grounds.

Petitioners' argument boils down to the following: plaintiffs should have to exhaust their state remedies before bringing a § 1983 action to avoid crowding the federal docket and "subject[ing] * * * local governments * * * to scrutiny under the federal Constitution".[1] (Pet. 29) If

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[1]Petitioners may be attempting to apply due process analysis to violations here of the Fourth Amendment, but if so, they err. See discussion, Daniels v. Williams, 474 U.S. 327, 337-339 (1985) (Stevens, J. concurring), Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985) ("the Parratt [due process] analysis is not applicable to a claim, such as the instant excessive use of force claim, brought under the Fourth Amendment"). Petitioners cite several cases for the proposition that this Court believes federal jurisdiction of § 1983 suits in general are trivializing the Constitution, e.g., Daniels v. Williams, id., Parratt v. Taylor, 451 U.S. 527 (1981), Baker v. McCollan, 443 U.S. 137 (1978), and Paul v. Davis, 424 U.S. 693 (1976), but all of these cases deal with various plaintiffs' attempts through § 1983 actions to expand the sweep of due process protection to encompass mere tort claims -- problems not applicable to this case, which involves Bill of Rights violations. Petitioners suggest that the State of Oregon offers protections of individual rights equivalent to federal protections without specifying what these protections might be. As a practical matter, it makes

this Court rejects the longstanding definition of "under the color of" law to substitute a threshhold that encompasses only actions in which state government officials acted consistently with state law, federal court caseloads and constitutional scrutiny of local officials will diminish. Therefore, they argue, this Court should grant certiorari to overrule the holding in Monroe that actions abusing power granted by state law constitute actions taken "under color of" state law.

Petitioners are not the first litigants to request on policy grounds

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no difference whether petitioner means these remarks to aid a due process analysis inappropriate to this claim, or to support a plea for requiring exhaustion of remedies. A successful attempt under either approach would result in a decision that if respondent has an adequate state remedy he is outside the scope of § 1983 protection. The practical result of any such decision would be to require respondent to exhaust adequate state remedies before bringing this § 1983 action in federal court, or to lose in that forum.

that this Court impose a requirement that plaintiffs exhaust their state judicial or administrative remedies before bringing a § 1983 action. Noting that "this Court has stated categorically that exhaustion [of administrative remedies] is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since McNeese v. Board of Education, 373 U.S. 668 (1963)," this Court in Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) added:

> Respondent and the Court of Appeals argue that exhaustion of administrative remedies should be required because it would further various policies. They argue than an exhaustion requirement would lessen the perceived burdens that § 1983 actions impose on federal courts * * * [P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent * * * The very difficulty of these policy considerations, and Congress' superior institutional competence to

> pursue this debate, suggest that legislative not judicial solutions are preferable. Id. at 512-513

Before Patsy, Monroe held that a plaintiff need not exhaust state judicial remedies to bring a civil rights action in federal court.

> It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence, the fact that Illinois by its constitution outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." Id., at 183 (cited with approval in Patsy, Ibid. at 181)[2].

---

[2]See also Steffel v. Thompson, 415 U.S. 452 (1974) (after exhaustive analysis of the legislative history of § 1983, the Court noted the primacy of the federal courts in protecting constitutional and other federal rights and ruled that the § 1983 plaintiffs did not need to exhaust state judicial or administrative remedies before suing in federal court).

Petitioners have not attacked the portion of the Monroe decision quoted above.

Petitioners seek to distinguish their case from others where exhaustion was not required by characterizing the State of Oregon, presumably unlike other states, as "ready, willing and able" to enforce the constitutional rights of its citizens. This is specious. To suggest that a government body has ever stood before a court claiming anything else strains credulity. This Court has held for over 25 years that a plaintiff need not exhaust available state judicial or administrative remedies before bringing an action under § 1983. Surely Congress is aware of this judicial interpretation and has chosen not to amend the statute to reflect petitioner's desired interpretation. Its silence must thus be considered approval of the status quo.

Neither are petitioners the first litigants to request this Court to overturn precedent and adopt a definition of "under color of" law different from that of Monroe on policy grounds. Monroe itself notes that after this Court defined the term "under color of" law in Classic, supra, government officials urged the Court to change that definition in ruling on Screws and again in ruling on Monroe.

> It was urged [in Screws] as it is here, that "under color of" state law should not be construed to duplicate in federal law what was an offense under state law. It was said there, as it is here, that the ruling in the Classic case as to the meaning of "under color of" state law was not in focus and was ill-advised. It was argued there, as it is here, that "under color of" state law included only action taken by officials pursuant to state law. We rejected that view. Id. at 184.

The Monroe Court then noted that the construction given the statute in Classic formulated a rule of law which had become the basis of federal enforcement in the important area of civil liberties.

> The rule adopted in that case was formulated after mature decision. * * * We do not have here a situation * * * where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The Classic case * * * was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the Classic case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of [the statute] to meet the exigencies of each case coming before us.

Monroe at 184-185, citing Screws at 112-113.

Monroe noted that Congressional activity in the 20 years intervening between Classic and Monroe would, if anything, buttress the view that Congress supported the Court's interpretation. "If the results of our construction of under color of law were as horrendous as now claimed" said the Court, "surely the voice of the opposition would have been heard [in Congress]." Monroe at 187. Forty-eight years have now passed since Classic was decided, and the above rings that much truer for the longer knell.

While courts do sometimes abandon precedent, this Court has made clear that this is not an action to be undertaken lightly.

> The Court has said often and with great emphasis that "the doctrine of stare decisis is of fundamental importance to the rule of law." Although we have cautioned that "stare

decisis is a principle of policy and not a mechanical formula of adherence to the latest decision," it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion."

Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

Patterson v. McLean Credit Union, 57 U.S.L.W. 4705, 4707 (June 15, 1989) (citations omitted).

The Patterson Court went on to describe what situations might present the kind of "special justification" needed to overturn a statutory precedent like Monroe.

> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision * * * .
>
> Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or

> because the decision poses a direct obstacle to the realization of important objectives embodied in other laws * * * .
>
> Finally, it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being "'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'"

Patterson, supra, at 4707.

Applying this analysis to Monroe makes it clear that the holding of Monroe as to the meaning of the term "under color of" law should stand. The development of the law in the intervening 48 years since Classic has only affirmed that the Court and the Congress approve of the "misuse of power" standard enunciated there and reiterated in Monroe. The Court in Monroe undertook an exhaustive analysis of the legislative history to arrive at its decision that the Classic definition furthered the legislative intent of the statute. This history, of course, has not

changed. Thus, the conceptual underpinnings of the decision are as sound today as they were the day Monroe was written.

Rather than contributing to confusion, Monroe has contributed to coherence and an ability of all parties to rely on a settled conclusion as to what the term "under color of" law means. Monroe is certainly consistent with the intuitive public sense of justice that would find it odd to be able to sue police officers or other government officials for doing their jobs properly, but not for abusing the authority of their offices. Clearly, no "special justification" exists for overruling Monroe under the Patterson test.

The cases petitioners cite to show the "flexibility" of the doctrine of stare decisis do not contradict the above analysis or result. In Hertz v. Woodman,

218 U.S. 205 (1910), the Court appeared to depart from prior decisions but explained that because these decisions were affirmances by an equally divided Court of the judgments of the courts below, they had no precedential value and hence did not violate the doctrine of stare decisis. In Helvering v. Hallock, 309 U.S. 106, 119 (1940), a tax code case, the Court noted that it was overturning precedent because of the difficulties which lower courts had found in applying the distinctions made by these cases and the seeming disharmony of their results. Id. at 110. It defined its problem as being "to determine whether we are to adhere to a harmonizing principle * * * or * * * to multiply gossamer distinctions between the present cases and the three earlier ones", Id. at 118, and "not that of rejecting a settled statutory construction," Id. at 122. None of these factors are present in Monroe to

militate against preserving its settled interpretation.

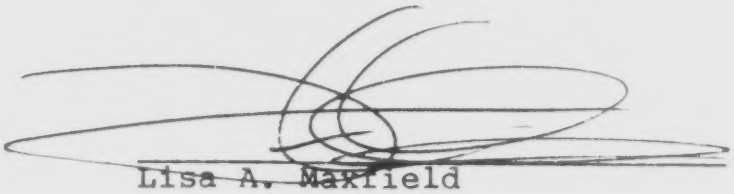
As the foregoing makes clear, Monroe articulated a sound doctrine based on the legislative intent of the statute and multiple judicial precedents from this Court. Congress has accepted these precedents with a silence implying approval for 48 years though as Monroe indicates it has been presented with multiple opportunities to amend the statute to do away with the legacy of Monroe and its predecessors. Petitioners have shown no special justification required to overrule such a settled statutory interpretation. This Court should thus DENY the writ and allow Monroe to stand.

CONCLUSION

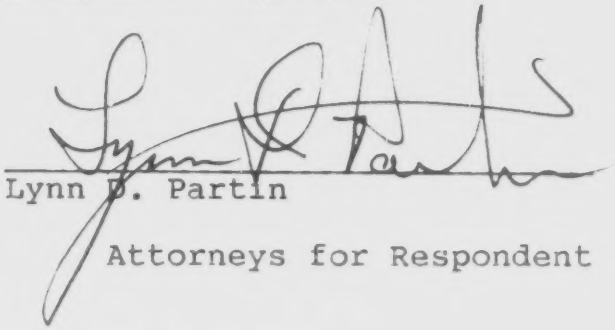
The Court should deny the petition for a writ of certiorari on both questions presented. The Court should affirm the

judgment of the Ninth Circuit and should reverse the judgment of the District Court.

Respectfully submitted,



Lisa A. Maxfield
Counsel of Record



Lynn D. Partin

Attorneys for Respondent

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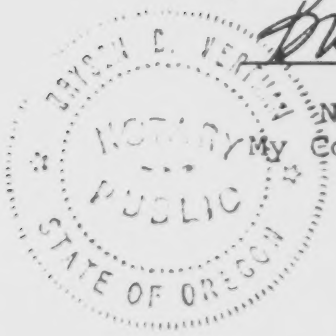
STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, Lisa A. Maxfield, am the counsel of record for respondent and am a member of the Bar of this Court. To my knowledge, the petition for certiorari in this case was filed by depositing in the United States Post Office at Portland, Oregon on Friday, July 7, 1989, forty copies of the petition, properly addressed to the Clerk of this Court, within the permitted time.

Lisa A. Maxfield

Subscribed and Sworn to before me this 5th day of July, 1989.

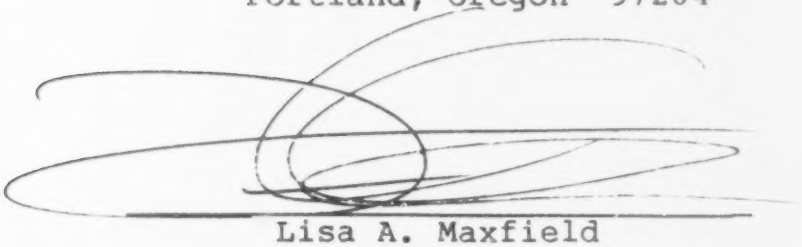
Bryson C. Wertman
Notary Public for Oregon
My Commission Expires: 1-18-92



CERTIFICATE OF SERVICE

I, Lisa A. Maxfield, certify that I am a member of the Bar of this Court and am counsel of record for respondent in this case. I further certify that service was made on the petitioners by depositing three copies of this petition in the United States Post Office at Portland, Oregon, on Friday, July 7, 1989, with first-class postage prepaid, addressed to petitioner's counsel of record in the court of appeals and district court actions:

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